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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-924

JOHN PAUL SHELTON, PETITIONER

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR REHEARING

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Attorney for Petitioner

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PETITION FOR REHEARING

The petitioner, John Paul Shelton, hereby petitions for a rehearing in the above-styled case, upon the following grounds, and for the following reasons:

GROUND 1

This Court should not irrevocably foreclose petitioner's right to appeal his federal conviction unless and until the state courts of Georgia have taken similar action with respect to the state conviction, which gave rise to the allegation of state fugitivity, which state fugitivity is relied upon by the Government as ground for dismissing the federal appeal.

Intervening circumstances relative to the state case should be considered. The undersigned counsel represents petitioner in his appeal in the state case. Notice of appeal to the Court of Appeals of Georgia was timely filed June 29, 1973. On December 19, 1973, the State filed a motion to dismiss the appeal on the ground, *inter alia*, that "defendant is and has been since prior to the imposition of sentences in said case a fugitive and without standing to appeal or apply to the Court for any order in furtherance of an appeal". However the State abandoned this motion; at any rate it has never been ruled upon adversely to petitioner. On March 22, 1974, the undersigned counsel filed a brief on the merits in the Court of Appeals of Georgia on petitioner's behalf.[1] (The delay in filing brief was occasioned by failure of the Court Reporter to complete the trial transcript until February 12, 1974, although the transcript had been ordered out by the undersigned counsel on June 29, 1973.) At the present time (April 6, 1974) no motion to dismiss the state appeal is pending in the Court of Appeals of Georgia. If such a motion should be filed, petitioner would oppose it on the ground that the Georgia Appellate Practice Act of 1965 forbids dismissal of the appeal on ground of fugitivity. This Act recites in its title that it is an Act to "comprehensively" revise appellate procedure, and "to define the instances in which an appeal may be dismissed" (Acts 1965, page 18). When the Act was amended in 1968, the title to the Amendment recited that the Act was "to provide that no appeal shall be

[1] A copy of the state brief is being filed herewith as an exhibit. The Court's attention is respectfully directed to pages 27-28, 86-90 of said brief, relative to circumstances of petitioner's "voluntary" absence from the last part of his state trial.

dismissed except under certain conditions" (Acts 1968, page 1072). The pertinent Section of the Act as it exists today commands:

Ga. Code Ann. 6-809(b):

> "(b) No appeal shall be dismissed or its validity affected for any cause or consideration of any enumerated error refused, except for: (1) failure to file notice of appeal within the time required as provided in this Act or within any extension of time granted hereunder; (2) where the decision or judgment is not then appealable, or (3) where the questions presented have become moot . . ."

The foregoing provisions of the Act appear to be in response to, or at least in conformity with, the oft-expressed views of former Chief Justice Duckworth of the Georgia Supreme Court, who repeatedly expressed the view that appeals should not be dismissed on ground of fugitivity. In *Ramsey v. State* (1957) 212 Ga. 793, 96 SE 2d 250, the Georgia Supreme Court, prior to adoption of the above-mentioned Act, dismissed an appeal on ground of fugitivity. Justice Duckworth said:

> "I concur in the judgment because of the case cited, and many others to the same effect, but I would prefer to overrule all such cases and decide the questions presented by this record. It is only in this manner that I can discharge fully the duties laid upon me by the Constitution and my oath to decide questions of law properly presented as the questions here are presented. But since the required number of the Justices to overrule those decisions cannot be obtained, they are controlling law of this State and I must follow them."

The above view was reiterated by Justice Duckworth in *Blalock v. State* (1959) 215 Ga. 61, 108 SE 2d 715, and in *Crane v. State* (1957) 213 Ga. 386, 98 SE 2d 903.

This view is now the law in Georgia, by virtue of *Section 6-809(b), supra.*

It would be anomalous if the state appellate court in this case should reject the proposition that fugitivity is ground for dismissing the appeal, while this Court approves the Government's argument that the state fugitivity is ground for dismissing the federal appeal.

This Court should at least hold the case open, pending the outcome of the state appeal and a ruling by the Court of Appeals of Georgia as to whether or not fugitivity will be considered as ground for dismissing the state appeal.

GROUND 2

This Court in denying petition for writ of certiorari may have mistakenly relied upon certain erroneous statements of fact contained in the Government's Opposition; to-wit:

(a) The Government erroneously asserted that the petition for writ of certiorari was "out of time" (Mem. 3). Actually, Justice Powell on December 13, 1973, extended the time for filing petition to December 19, 1973. The petition was docketed December 13, 1973, hence was not out of time.

(b) The Government erroneously states in its Memorandum in Opposition, page 3, marginal note 2, that dismissal by the court below of appeal from judgment of conviction occurred "subsequent to the filing of this petition". Actually, the lower court dismissed the appeal in an Order dated November 12, 1973. This particular Order is the one upon which review is sought in the instant proceeding in this Court. A copy of said Order appears at page 11a of the petition for writ of certiorari.

(c) The Government erroneously suggests that the instant petition for writ of certiorari "rehashes the same arguments made in the (prior) petition for a writ of certiorari filed after the conditional dismissal of the appeal" (referring to Case No. 73-413 in this Court). Actually, the instant petition raises, for the first time, the issue that appeal is a matter of right, constitutionally protected; furthermore, the instant petition is concerned primarily with the "final" dismissal of the "appeal" by the court below, while the prior petition was concerned primarily with the "conditional" revocation of "appeal bond".

CONCLUSION

For the foregoing reasons petitioner respectfully prays that the Court will grant a rehearing and reverse the judgment below; in the alternative, petitioner prays that the Court will retract or suspend its order denying petition for writ of certiorari, or otherwise keep this case open pending disposition of the state appeal with respect to question of whether fugitivity will constitute ground for dismissing the state appeal.

Respectfully submitted,

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CERTIFICATE OF COUNSEL PURSUANT TO RULE 58

The undersigned counsel hereby certifies that the foregoing petition for rehearing is filed in good faith and not for delay, and that the grounds set forth in said petition for rehearing are restricted to the grounds specified in Rule 58, paragraph 2, of the Rules of this Court.

WILLIAM V. HALL, JR.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify this 9th day of April, 1974, that I have served three copies of the foregoing petition for rehearing on the United States by mailing same, postage prepaid, to Hon. Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C.

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